BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FELIX AMADOR Claimant	)	
VS.	)	
MID-AM BUILDING SUPPLY, INC. Respondent	)	Docket No. 1,005,797
AND	)	
INDIANA LUMBERMENS MUTUAL Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the September 20, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on January 4, 2006.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that claimant's initial accident occurred on September 15, 2001, and that this is the starting date for the alleged series of accidents, not September 1, 2001, as found by the ALJ.[1]

[1]Claimant's submission letter to the ALJ incorrectly stated under "Stipulations" that "the alleged date of claimant's injuries is September 1, 2001, and each day worked through January 22, 2003."

ISSUES

The Administrative Law Judge (ALJ) found claimant had a 13 percent functional impairment. The ALJ also found that claimant had made a good faith effort to become employed. Accordingly, the ALJ awarded him a 100 percent wage loss. The ALJ determined that Dr. Philip Mills' task loss percentage was the most credible and claimant had a 36 percent task loss. These combined for a 68 percent work disability. The ALJ further found that claimant suffered a single accident and injury, not a series of accidents, and that claimant's date of accident was September 1, 2001[2]. Based upon that accident date, the ALJ found that claimant's average weekly wage (AWW) was $401.25.

Respondent argues that a wage should be imputed to claimant after he was released from treatment and before he was given accommodated work by respondent and therefore claimant's wage loss was less than 100 percent. Respondent also argues that claimant did not make a good faith effort to become employed after he was eventually laid off by respondent in May 2005 and, therefore, a wage of $6.50 to $7 per hour should be imputed to claimant based on the testimony of Karen Terrill and Doug Lindahl. Respondent also argues that claimant is not entitled to work disability from July 1, 2004, through December 21, 2004, because he is an alien and did not have a work permit that would legally allow him to work in the United States. Respondent further contends that claimant is not entitled to work disability from December 22, 2005 through May 5, 2005, because he was working an accommodated job at respondent during that period and was making more than 90 percent of his preinjury wage.

Claimant contends the ALJ used the wrong date of accident and AWW in computing the Award. Claimant contends he suffered a series of repetitive accidents commencing on September 15, 2001, through January 22, 2003, the last day he worked before his first surgery. Claimant also states his hourly wage on January 22, 2003, was $9.50 per hour and, including his overtime for the six months prior to January 22, 2003, his AWW was $478.50 per week. Claimant also argues that he is entitled to a 16.5 percent functional disability to the body as a whole, which would be a split of the ratings of Dr. Mills and Dr. Pedro Murati. Claimant agrees with the ALJ that he is entitled to a 100 percent wage loss but argues he is also entitled to a 100 percent task loss based on the testimony of Dr. Pedro Murati. Accordingly, claimant argues he is entitled to a 100 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that

[2]Although the Award finds a date of accident of September 1, 2001, the parties agree the date of the initial accident was September 15, 2001.

claimant's permanent partial disability compensation award should be limited to his percentage of functional impairment during the time he was not working and his work visa was expired, as well as during the time claimant had returned to work for respondent in an accommodated job that paid him at least 90 percent of his preinjury AWW, but that the ALJ's award should otherwise be affirmed.

Claimant began working for respondent in July 2001, building doors and doing carpentry. He testified that the doors weighed between 15 pounds and 100 pounds each, depending on the size of the door. On September 15, 2001, as he was lifting a door to place it in a cart, he felt immediate pain in his low back and legs and heard a pop. He testified he dropped the door and fell to the floor. He reported the injury to his supervisor, Jerry Heimerman, but respondent did not immediately offer him medical treatment and continued to work him at his regular job. Claimant, on his own, visited a chiropractor but later, on the advice of Mr. Heimerman, saw Dr. Michael Estivo, who treated him with epidural injections and restricted him from lifting more than 25-pounds. Dr. Estivo finally recommended surgery. After claimant saw several other doctors, respondent finally, on December 23, 2002, sent him to Dr. Raymond Grundmeyer, III. Dr. Grundmeyer noted that claimant had undergone general conservative treatment with no improvement and was a candidate for surgery. He performed surgery on January 23, 2003. Because the first fusion failed, claimant needed to have a second surgery. This surgery was performed on December 19, 2003. Dr. Grundmeyer last saw claimant on June 30, 2004, at which time claimant was at maximum medical improvement.

Respondent first argues that claimant should not be entitled to a 100 percent wage loss for the period he was unemployed after his release from treatment by Dr. Grundmeyer until he became reemployed by respondent in an accommodated job. When claimant was released from treatment on June 30, 2004, he returned to respondent and spoke to Mr. Heimerman. Gary Jacobs, branch manager for respondent, testified that claimant told Mr. Heimerman that he was ready to return to work but that he wanted to return to his regular job of building doors. After looking at claimant's restrictions, Mr. Jacobs decided claimant would not be able to build doors. Claimant testified that he preferred to build doors but if they had given him some other job, he would not have minded.[3] Mr. Jacobs testified that respondent did not offer claimant any other job and claimant did not request a light duty job. Claimant, however, testified that Mr. Heimerman told him respondent did not have any work for him, that claimant would have to wait but that Mr. Heimerman did not think respondent would hire him back.

At the regular hearing held on December 20, 2004, claimant submitted a list of almost 150 businesses he had contacted looking for work. He said he started looking for work as soon as he was released from treatment by Dr. Grundmeyer.

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[3]R.H. Trans. at 38.

A few days before the regular hearing was held, respondent became aware that claimant was not working. Claimant testified he received a telephone call from Mr. Jacobs, who told him that respondent had a light-duty job for him starting December 22, 2004. Respondent contends it had been under the impression that claimant would only accept a job building doors so there was no discussion about accommodated jobs. Respondent argues that claimant made no request for an accommodated job and that as soon as they were informed that claimant was not working, in December 2004, an accommodated job was found for him. However, in a letter from claimant to respondent dated December 20, 2004, claimant stated: "Since I had my low back injury and had my back operations, I have contacted my boss, Jerry [Heimerman] on several occasions seeking work at Mid-Am. I have been told that there was nothing for me."[4] The Board finds that claimant would have accepted an accommodated job from respondent sooner if it had been offered. Claimant never refused to work any appropriate job and did not violate the principles in *Foulk.*[5]

Respondent next contends that claimant is not entitled to work disability from July 1, 2004, through December 21, 2004, because he did not have a work permit that would legally allow him to work in the United States. Claimant was born in Cuba and came to the United States in 1980. He is not a United States citizen but has a social security card and is a legal alien. Claimant introduced into evidence an Employment Eligibility Verification issued by the United States Department of Justice authorizing him to work in the United States until July 16, 2002. While he was off work because of his surgeries, claimant let his work permit expire and had to reapply for another when he went back to work for respondent in December 2004. When claimant returned to work on December 22, 2004, his work permit was not current, so Mr. Jacobs told him they could not let him work. Mr. Jacobs testified that claimant left that day at noon and was gone a week, maybe two, getting his work permit renewed. Claimant introduced as an exhibit a copy of his work permit issued December 29, 2004, which expires on December 28, 2005.[6] The Board finds that because claimant could not legally work during the time beginning with his June 30, 2004, release by Dr. Grundmeyer until December 29, 2004, when his work permit was issued, he is not eligible for a work disability. During this period, his permanent partial disability should be limited to his percentage of functional impairment.

Respondent also argues that claimant is not entitled to work disability from December 22, 2004 through May 5, 2005, because during that period of time he was working an accommodated job at respondent making $9.50 per hour, which is more than 90 percent of his preinjury wage. Respondent's brief indicates that claimant was paid through May 5, 2005. In reviewing the wage information introduced into the records by

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[4]R.H. Trans., Cl. Ex. 1.

[5]*Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[6]Amador Depo., Ex. 2.

respondent[7], it appears that the last full paycheck claimant received paid through April 3, 2005. Claimant also received a partial paycheck for the period from April 4, 2005, through April 17, 2005. Claimant received a check dated May 5, 2005, which appears to be payment for accrued vacation and sick leave. Claimant testified the last day he worked for respondent was April 7, 2005. The Board finds that claimant is not eligible for a work disability during the time he was employed by respondent and earning at least 90 percent of his preinjury AWW.[8] During the time from December 29, 2004, through April 7, 2005, claimant's permanent partial disability award is limited to his percentage of functional impairment.

Respondent next contends claimant did not make a good faith effort to become employed after he was laid off and, therefore, a wage should be imputed to him for the period after May 6, 2005. As stated above, the Board finds claimant's last day of work for respondent was April 7, 2005, not May 6, 2005.

Although not stated in K.S.A. 44-510e(a), it is well settled that an injured worker must make a good faith effort to return to work within his or her capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[9] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[10] In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[11]

At claimant's evidentiary deposition taken on May 16, 2005, he again submitted a list of businesses he had contacted about employment after he was laid off by respondent. That list contained the names of 38 businesses. He testified that when contacting prospective employers, he called some on the telephone and some he visited in person. Respondent argues that only one of the places claimant visited was actually hiring. Respondent contends that merely calling or stopping by potential employers that are not hiring does not constitute a good faith effort to obtain work.

The Board finds claimant has demonstrated a strong work ethic and willingness to perform almost any kind of work within his restrictions. He endured much pain in continuing to work for respondent long past his injury until leaving work for surgery. He

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[7] Jacobs Depo., Ex. 3 at 1.

[8] K.S.A. 44-510e(a).

[9] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] *Parsons v. Seaboard Farms, Inc.* 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

returned to work for respondent when an accommodated job was offered. He would likely still be working had respondent not laid him off. Claimant's job search efforts have been adequate. Claimant has established that he is looking for work in good faith. Therefore, claimant is entitled to a work disability based upon his actual wage loss beginning April 8, 2005.

Claimant contends the ALJ utilized the wrong date of accident and the wrong AWW in calculating his Award. Wage information produced by respondent showed claimant's wages for his first eight weeks of work, August through September 2001. Respondent calculated claimant's wage for this period by using a base wage of $320 per week. Claimant also earned $650 in overtime and a "spiff" or bonus during the period through the pay check dated September 13, 2001. Respondent divided $650 by 8 weeks for an average weekly overtime wage of $81.25. This, added to the $320 base wage, made an AWW of $401.25. In his Award, the ALJ utilized a date of accident of September 1, 2001, and an AWW of $401.25. In his letter to the ALJ of September 9, 2005, claimant's attorney states that if the ALJ utilizes a date of accident of September 1, 2001, claimant's overtime should be divided by six weeks instead of eight weeks, making an average weekly overtime of $108.33, which added to the base wage of $320 would calculate to an AWW of $428.33. This argument is based upon the incorrect initial accident date of September 1, rather than September 15, 2001.

Claimant's Application for Hearing, filed August 23, 2002, sets out a date of accident of "9/01 and each day worked thereafter." Claimant argues the ALJ should have utilized a date of accident of January 22, 2003, which was the last day claimant worked before his first surgery. On January 22, 2003, claimant was earning $9.50 per hour for a base weekly wage of $380. Claimant testified he was working from zero to three hours overtime per week. Claimant's attorney averaged this claimed overtime and calculated that claimant's average weekly overtime would be $106.90 per week. This amount, added to claimant's base wage of $380, would make his AWW on January 22, 2003, $486.90.

Claimant states that although respondent had notice of his September 15, 2001, injury, respondent did not offer medical treatment for the injury and claimant continued his regular work building doors, which included bending, twisting and lifting. Claimant states that even after he received a 25-pound weight limit restriction from Dr. Estivo, he continued building doors as this was the only work respondent offered him. As a result of this, claimant's back condition worsened and he suffered injuries on each day work until his surgery on January 23, 2003.

Dr. Grundmeyer testified that claimant complained of increased back pain and numbness in his toes and tingling in both legs, which indicated a progression of his symptoms. Dr. Grundmeyer stated that if claimant had been working since his injury of September 15, 2001, lifting doors weighing as much as 100 to 150 pounds, it would likely have aggravated his symptoms and increased his pain. It should be noted that claimant worked within Dr. Estivo's 25-pound lifting restriction beginning in February 2002. On

cross-examination, Dr. Grundmeyer also stated that with a disc herniation, despite conservative treatment and limited lifting and bending, one can still have a worsening by natural progression of the disease.

Dr. Pedro Murati saw claimant on August 4, 2004, at the request of claimant's attorney. Dr. Murati diagnosed claimant with low back pain status post L5-S1 laminectomy and fusion with cages and left sacroiliac joint dysfunction. Dr. Murati testified that claimant had a previous nonsymptomatic degeneration which became symptomatic when claimant lifted the door on September 15, 2001. He was not asked to give an opinion as to whether claimant's continued working at respondent after his injury and before his surgery aggravated his back condition.

Dr. Philip Mills is board certified in physical medicine and rehabilitation. He examined claimant at the request of respondent on March 10, 2005. At the time, claimant was still employed at respondent doing light duty work. Dr. Mills diagnosed claimant with lumbar L5-S1 degenerative disc disease with disc herniation and radiculopathy caused by his reported injury of September 15, 2001. He opined that lifting the door on that date caused the herniated disc. Dr. Mills testified that assuming claimant continued his job at respondent after his September 15, 2001, injury and continued to bend and twist while lifting and putting together doors and door frames, that work activity could likely aggravate his degenerative disc disease. He also stated that he would not be surprised if there was a worsening of symptoms by a natural progression of the disease.

The Board finds that claimant's date of accident is September 15, 2001. He may have had aggravation and worsening of his symptoms from his job activities after September 15, 2001, but his injury was the result of the single traumatic event on September 15, 2001. Based upon a September 15, 2001 date of accident, the Board finds claimant's gross average weekly wage is $401.25 and his compensation rate is $267.51.

Claimant was given functional ratings by both Dr. Murati and Dr. Mills. Dr. Murati found that claimant had a 20 percent functional impairment to the body as a whole. Dr. Mills opined that claimant had a 13 percent functional impairment to the body as a whole. The ALJ found the opinion of Dr. Mills to be more persuasive and found claimant had a 13 percent impairment of function to the body as a whole. The Board agrees with the ALJ and finds that claimant has a 13 percent functional impairment to the body as a whole.

As a final issue, claimant argues that he is entitled to a 100 percent work disability based on a wage loss of 100 percent and a task loss of 100 percent. During his deposition, Dr. Murati reviewed the task list prepared by Mr. Lindahl and opined that claimant could not perform any of the tasks and had a 100 percent task loss. Dr. Mills opined, using the task list prepared by Ms. Terrill, that claimant had a 36 percent task loss. Dr. Grundmeyer reviewed the task lists prepared by both Mr. Lindahl and Ms. Terrill. Using the list prepared by Mr. Lindahl, Dr. Grundmeyer testified that claimant would have a 27

percent task loss. Using Ms. Terrill's list, Dr. Grundmeyer opined claimant would have a 29 percent task loss. The ALJ found that the opinion of Dr. Mills was most credible and found that claimant had lost the ability to perform 36 percent of the tasks he had performed in the 15 years before his injury. The Board agrees and affirms the ALJ's finding of a 68 percent work disability, although the ALJ's award is modified to start the work disability on April 8, 2005. Before that, claimant's permanent partial disability award is limited to his 13 percent permanent impairment of function.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 20, 2005, is modified as follows:

For his September 15, 2001, accidental injury and resulting disability, claimant is entitled to 75.14 weeks of temporary total disability compensation at the rate of $267.51 per week or $20,100.70 followed by 46.13 weeks of permanent partial disability compensation at the rate of $267.51 per week or $12,340.24 for a 13 percent functional disability. Due to the accelerated payout formula, the 13 percent permanent partial disability compensation would have paid out on August 4, 2002. Temporary total disability compensation ended June 30, 2004. Beginning April 8, 2005, claimant is entitled to 195.17 weeks of permanent partial disability compensation at the rate of $267.51 per week or $52,209.93 for a 68 percent work disability. This makes a total award of $84,650.87.

As of January 12, 2006, there would be due and owing to the claimant 75.14 weeks of temporary total disability compensation at the rate of $267.51 per week in the sum of $20,100.70 plus 86.13 weeks of permanent partial disability compensation at the rate of $267.51 per week in the sum of $23,040.64 for a total due and owing of $43,141.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $41,509.53 shall be paid at the rate of $267.51 per week for 155.17 weeks or until further order of the Director.

The Board adopts the findings, conclusions and orders of the ALJ not inconsistent with the above.

The claimant's contract with his attorney for the payment of fees and expenses is approved subject to the provisions of K.S.A. 44-536.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director